

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
Agricultural Commissioner of
the County of San Luis Obispo
(County File No. 031-ACP-SLO-07/08)

Administrative Docket No. 158

DECISION

**Tri-Cal, Incorporated
Post Office Box 1327
Hollister, California 95024**

Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5, and Title 3, California Code of Regulations (3 CCR) section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 against a person who violates certain California pesticide laws.

After giving notice of the proposed action and providing a hearing, the San Luis Obispo CAC found that the appellant, Tri-Cal, Inc., violated FAC section 12973. The CAC levied a total penalty of \$2,500.

Tri-Cal appealed the CAC's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

Factual Background

On September 4, 2007, TriCal, Inc., a pest control business, applied Tri-Con 57/43, a methyl bromide/ chloropicrin mix fumigant pesticide, for Herrera Farming while a residence within the outer buffer zone of that application was occupied.

Appellant's Contentions

On appeal, TriCal contends that it should not be held responsible for a residence within the buffer zone being occupied because Herrera Farming was supposed to ensure the residence was vacant, and TriCal took reasonable steps to determine whether it was occupied.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. The Director affirms the CAC's decision if it is supported by substantial evidence. The substantial evidence test requires sufficient relevant evidence and inferences from that evidence to support a conclusion by a reasonable person, even though a reasonable person might also have made different findings. Witnesses sometimes present contradictory testimony; however, issues of witness credibility are the province of the Hearing Officer.

Where a CAC's decision presents a question of the law, the Director decides that issue using her independent judgment.

Findings and Analysis

Substantial evidence supports the CAC's decision.

Use of a pesticide may not conflict with the conditions of a permit issued by the CAC. (FAC section 12973.) On September 4, 2007, TriCal performed a pre-plant soil fumigation with a methyl bromide product (Tri-Con 57/43, U.S. EPA reg. no. 11220-4) under Restricted Materials Permit 40-07-4202115, issued by the CAC to Herrera Farming. (Stipulations, Exhibit U.) The following permit condition applied:

Property Operators and Pest Control Businesses associated with the use of Methyl Bromide/ Chloropicrin for Field Fumigations shall comply with Sections 6450.1, 6450.2, 6450, and 6784 of the California Code of Regulations.

(Restricted Materials Permit #6: Permit Conditions for Methyl Bromide Soil Fumigation, Exhibit W.)

Those regulations include the following requirement: "In no instances shall the outer buffer zone contain occupied residences . . . while the outer buffer zone is in effect."¹ The permit further specifies, "The fumigation applicator and the property operator . . . share the responsibility to insure that there are no occupied structures in the Outer Buffer Zone." (Stipulations, Exhibit W at section E.)

Substantial and undisputed evidence supports the Hearing Officer's conclusion that TriCal fumigated the site with Tri-Con while a residence within the outer buffer zone for that application was occupied. (Stipulations 12 & 13, Schmitz testimony.) Thus, substantial evidence supports the conclusion that TriCal used a pesticide in conflict with the permit, a violation of section 12973.

TriCal argues that it made a reasonable attempt to determine whether the residence was occupied. TriCal's efforts to comply may be relevant to the appropriate fine amount. However, making a reasonable attempt to determine whether the residence is occupied is not a defense to the violation charged. The permit could not be clearer on this point. *In no instances* shall the outer buffer zone contain occupied residences; the fumigation applicator and the property operator share the responsibility *to insure* that there are no occupied structures in the outer buffer zone. When it fumigated a field with Tri-Con while a house within the buffer zone was occupied, TriCal violated the conditions of the permit.

TriCal argues that Herrera Farming did not live up to its duty as the property operator to submit an adequate Work Site Plan (WSP), and to notify the residents within the buffer zone when they needed to vacate; and that the CAC did not live up to its responsibilities when it accepted the WSP. TriCal complains that it was held responsible for the property operator's failings. It was not. TriCal is liable because a residence in the buffer zone was occupied during its application, not because the WSP or notice to the resident was inadequate.

¹ Former 3 CCR section 6450(f)(3), renumbered as section 6447.2(f)(3) on January 25, 2008, without substantive change.

If TriCal is arguing that it should not be penalized because it relied on Herrera Farming and the CAC, then it fundamentally misunderstands its responsibility. TriCal is not subject to all of the requirements that the property operator is. However, it must insure that it does not fumigate if there are occupied residences in the buffer zone, regardless of what anyone else does or does not do. Knowing that it faces very significant potential liability if it fumigates while a house in the buffer zone is occupied, TriCal should have implemented its own policies and procedures to insure that does not do so.²

The fine amount is appropriate.

The CAC may levy a fine from \$700 to \$5,000 for a Class A violation. The CAC classed this violation as "Class A" because he found it "created an actual health or environmental hazard." [See 3 CCR section 6130(a)(1)(A).] That decision is supported by substantial evidence. TriCal fumigated with methyl bromide while an occupied residence was within the buffer zone established for that application. This was not a technical or paper work violation. TriCal actually injected methyl bromide 45 feet from someone who was actually in his house. That will always be a Class A violation. DPR established the relevant buffer zone requirements and guidelines by regulation after extensive public process because it found that allowing methyl bromide fumigations next to an occupied residence posed an unacceptable risk to human health. That decision is not open to debate in local enforcement proceedings.

TriCal argues that workers are allowed right next to fumigated fields and do not get sick. Such workers are trained, know the application is going on, would know if an emergency occurred, and would have appropriate personal protective equipment available to protect themselves. Furthermore to class a violation as "A," the hazard to human health at issue need not be a risk of acute illness.

TriCal also intimates that a \$2,500 fine is unfair. Where the CAC places a fine within the allowed range is not a choice DPR needs to review. Nevertheless we note that the CAC's selection of the fine amount seems reasonable. The claimed failures on the part of the grower and the CAC do not warrant any mitigation. TriCal helped draft, and signed, the WSP that it complains about *prior* to its violations. TriCal submitted the WSP to the CAC that it claims should not have been approved and TriCal went ahead with an application that it claims should have stopped. If TriCal thought the WSP was inadequate, or that the grower had not given adequate notice to the residents, then its failure to carefully check the residences adjacent to the bloc it fumigated is *more* egregious.³ If it thought that application should not proceed until the grower first fulfilled its responsibilities to TriCal's satisfaction, then it should have had a provision in its contract to that effect, and should not have made the application. It is not surprising that the CAC felt TriCal is not taking its responsibilities seriously enough.

² See FAC sections 12996-12999.4 and 11708.

³ TriCal's efforts to comply appear lacking. Although TriCal's employee testified he knocked on the door, Inspector Schmitz was able to determine the residence was occupied by knocking on the door and loudly announcing himself. TriCal's employee testified that he does not normally check residences.

Conclusion

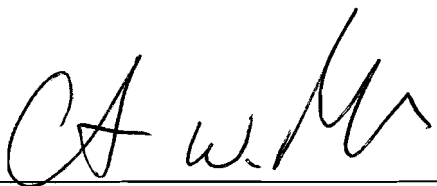
For the foregoing reasons, the CAC's decision to levy a penalty of \$2,500 against TriCal for violating FAC section 12973 is supported by substantial evidence.

Disposition

The CAC's decision is affirmed. The CAC will notify the Respondent when and how to pay the penalty.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: SEP 30 2008

By: 
Mary-Ann Warmerdam, Director